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In The

Supreme Court of the United States

October Term 1995

ARTHUR RICHARD MYERS, JR.,
a/k/a Dick Myers,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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80 pp

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's guarantee of due process is violated when a lessor of transportation facilities used by its lessees to distribute contraband is convicted of conspiring with them without any evidence that he knew of their purpose.

2. Whether a defendant's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law are violated when a hearsay declarant is not present for cross-examination at trial, there is no evidence that the defendant engaged in a conspiracy, and the hearsay is nevertheless admitted as statements by a co-conspirator.

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No. _____

ARTHUR RICHARD MYERS, JR.,
Petitioner,

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COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Arthur Richard Myers, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

By its unpublished opinion dated May 17, 1994, (App., infra, A-10), the Court of Appeals of Virginia affirmed Mr. Myer's conviction of conspiracy to distribute more than five pounds of marijuana. On June 30, 1994, the Court of Appeals of Virginia denied Mr. Myers' petition for rehearing en banc. (App., infra, A-17). The appeal to the Supreme Court of Virginia was not perfected in the manner provided by law, and Mr. Myers' petition for appeal to that court was dismissed on August 30, 1994. (App., infra, A-18). Upon a petition for a writ of habeas corpus, the Supreme Court of Virginia on November 16, 1994, granted Mr. Myers leave to apply for an appeal from the order entered on June 30, 1994, by the Court of Appeals of Virginia. (App., infra, A-19). The Supreme Court of Virginia refused Mr. Myers' petition for appeal on August 3, 1995, (App., infra, A-1), and denied his petition for rehearing on September 15, 1995. (App., infra, A-21).

JURISDICTION

The judgment of the Supreme Court of Virginia refusing Mr. Myers' petition for appeal was entered on August 3, 1995. A petition for rehearing was denied on September 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code § 18.2-248.1 provides in pertinent part:

> Except as authorized in the Drug Control Act, Chapter 34 of Title 54.1, it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.
>
> > (a) Any person who violates this section with respect to . . . [m]ore than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years . . .

Virginia Code § 18.2-256 provides in pertinent part:

> Any person who conspires to commit any offense defined by this article . . . is punishable by imprisonment or fine or both which may not be less than the minimum punishment nor exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy.

STATEMENT

On March 16 and 17, 1992, the Petitioner, Arthur Richard Myers, Jr., was tried before a jury in the Circuit Court of Northampton County in the Commonwealth of Virginia on a charge of conspiracy to distribute more than five pounds of

marijuana; at the conclusion of the trial, the jury found Mr. Myers guilty as charged and recommended a sentence of ten years in the state penitentiary. (App., infra, A-4). The case was continued, pending a presentence report, and on May 8, 1992, the trial court imposed the sentence recommended by the jury. (App., infra, A-7). In an unpublished opinion entered on May 17, 1994, the Court of Appeals of Virginia affirmed Mr. Myers' conviction. (App., infra, A-10). Mr. Myers petitioned the Court of Appeals of Virginia for a rehearing en banc, which petition was denied on July 1, 1994. (App., infra, A-17). Mr. Myers' appeal to the Supreme Court of Virginia was not perfected in the manner provided by law, and his petition for appeal to that Court was dismissed on August 30, 1994. (App., infra, A-18). Upon a petition for a writ of habeas corpus, Mr. Myers was granted leave by the Virginia Supreme Court on November 16, 1994, to apply for an appeal from the order of the Court of Appeals of Virginia of June 30, 1994. (App., infra, A-19). Mr. Myers appealed to the Supreme Court of Virginia, which refused his appeal on August 3, 1995. (App., infra, A-1). On September 15, 1995, the Virginia Supreme Court denied rehearing. (App., infra, A-21).

A. The Trial

The Commonwealth relied on the testimony of Wilfredo Cejas in attempting to prove Mr. Myers' guilt. Prior to 1982, Mr. Cejas, the owner of a jewelry store in Miami, Florida, acted as a broker bringing together buyers and sellers of marijuana. (Tr. pp. 63-64)[1]. Mr. Cejas expanded his participation in 1982 to include organizing transfers of large quantities of marijuana (Tr. p. 64). During the middle of 1982, Mr. Cejas arranged the off-loading of marijuana by clam boats from a ship to docks in Atlantic City, New Jersey. (Tr. pp. 64-67). In the course of that

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[1] Citations herein to the Transcript of the Trial of March 16 & 17, 1992, shall be to "Tr.".

operation, Mr. Cejas utilized the services of a man known to him only as Lester, who had contacts and who served as a middle man in locating the docks for off-loading. (Tr. pp. 62, 65).

Later in 1982, when Mr. Cejas and his co-conspirators were contemplating bringing in another load of marijuana, the docks in Atlantic City were no longer available, and Lester said that he knew someone else who had a dock and a clam boat. (Tr. pp. 69, 70-71). According to Mr. Cejas, Lester took him to a restaurant in Virginia, where they met the appellant, Mr. Myers. (Tr. pp. 62, 71-72). As part of his business, Mr. Myers owned a clam processing plant, a clam boat, and a dock in Cape Charles, Virginia. Mr. Cejas' testimony regarding his introduction to Mr. Myers was as follows:

Q Did Lester introduce Mr. Meyers (sic) to you by name?

A I don't remember. It's ten years ago, but he said this is -- so and so or a friend of mine.

Q And did the three of you sit down at a table?

A We sat, yes.

Q And could you tell what the jury what the gist of the conversation was -- what you talked about?

A Prior to this, Lester was supposed to have already talked to Mr. Meyers and let him know what I was looking for.

Q And what were you looking for?

A And so by now I assumed that Mr. Meyers was interested and, therefore, all I had to say is well -- you know -- what I'm looking for is a boat, a dock to get the merchandise in; and he said basically Lester will handle that.

Q How about somebody to work the boat? Did you talk about that?

A I would need a captain as well, yes.

Q And did you tell that to Mr. Meyers?

A I did, yes.

Q And did he agree to provide a captain also?

A Well, at that time he agreed that Lester was taking care of it.

Q Now, I just heard you talk about merchandise. When you refer to merchandise, what were you talking about?

A Marijuana.

Q Was there any doubt -- well --

A Well --

Q Was it clear in the conversation what you were talking about?

A Well, we were in a restaurant. There were people around. I wasn't going to say, well, I'm going to need a boat and captain for marijuana. So I used merchandise very often -- you know -- and he was supposed to have known what the meeting was about.

MR. MORCHOWER: I'm objecting to what Mr. Meyers was supposed to have known. I think that's an improper response.

THE COURT: I'll sustain the objection.

MR. JONES: Talking about what's in Mr. Cejas' mind.

THE COURT: What's that?

MR. JONES: What was in Mr. Cejas' mind.

THE COURT: He can say what was in his mind, but he can't say what was in somebody else's mind.

BY MR. JONES:

Q Now, at the end of the meeting, did you feel that you had reached an agreement with Mr. Meyers that he would supply a boat and a captain?

MR. MORCHOWER: Objection. That's an improper question as to whether or not he felt. He can describe what

happened, what he did. As far as his feeling, his supposition, his belief, his assumptions are all immaterial.

THE COURT: I think he can testify.

MR. MORCHOWER: What he did.

THE COURT: What the outcome was. Go ahead.

A Well, it was a quick meeting. I would say ten, fifteen minutes. We didn't eat anything. We simply had some coffee or something light -- you know -- and the last word was that Lester will take care of things and that was it; and my assumption was that -- you know -- that yes, we had something.

(Tr. pp. 74-76).

Mr. Cejas testified that he and Lester met a second time with Mr. Myers, as follows:

A During my scouting, one of the trips to Virginia here, we stopped by his plant -- Lester and I again; and he came out -- you know -- I didn't really go in the plant, and we talked.

We didn't talk -- most of what we talked about was basically his processing plant over there. We didn't really talk about any trip or anything until the last minute

that I said, well, how are things coming along -- you know -- and he said, "Well, Lester is taking care of it. Lester is handling it. Don't worry about it."

(Tr. pp. 80-81).

According to Mr. Cejas, he met Mr. Myers a third time, at Pier 66 in Fort Lauderdale, Florida, and he testified regarding that meeting as follows:

Q What is Pier 66?

A It's a hotel marina type of setup.

Q And on this occasion, who was there?

A Mr. Meyers was there. He -- I knocked on the boat, and he came out, and we took a walk to the lounge that they had there, a little bar or something; and basically his concern is whether the trip was still on; and I assured him that, yes; and I -- to the best of my recollection, I must have given him a date or assured him that it was coming or something.

Q Okay. Was Lester at this meeting?

A No.

Q So he had arranged this meeting or told you where to find him?

A Yes.

Q Okay. Now, is there any doubt when you're talking about a trip -- any doubt that Mr. Meyers knew what the trip was?

MR. MORCHOWER: Objection. That isn't a proper question.

THE COURT: I sustain the objection.

BY MR. JONES:

Q Tell me exactly what Mr. Meyers wanted to know from you, or describe the conversation.

A Well, it's been ten years ago; so exactly, I can't pinpoint exactly how the conversation went as to how -- what were the words used. Basically he was interested in knowing whether the trip was coming in. He might have referred to it as weed or whatever else that was the linguistic back in those days -- you know.

Like I say, I'm assuming he knows what's going on. We got people around us. We're not discussing marijuana -- you know -- or any other thing around people. So this is basically what happened.

Q Okay, Was there any question in your mind that what the two of you were talking about -

MR. MORCHOWER: Objection.

A There was no question in my mind.

THE COURT: He can testify as to what he thought it was. He can't testify what he thought somebody else thought.

MR. MORCHOWER: Yes, sir.

(Tr. pp. 81-83).

Despite his testimony that he had met on three occasions with Mr. Myers, Mr. Cejas was unable to identify Mr. Myers in a six-person photographic spread. Only after he was shown one group photograph containing several people, with Mr. Myers as the only one who had also been in the six-person photographic spread, did Mr. Cejas identify Mr. Myers. (Tr. pp. 212-214).

According to the Commonwealth's witnesses, in the early morning hours of November 22, 1982, Mr. Cejas and his co-conspirators used Mr. Myers' clam boat to transport marijuana from a ship to Mr. Myers' dock. Mr. Cejas had arranged to have trucks waiting at the dock to pick up the marijuana. (Tr. p. 98). The evidence indicated that clam boats routinely came in at night and that trucks also routinely came to the dock at night to pick up clams from the boats. (Tr. p. 204).

The water was extremely rough on November 22, 1982, and the clam boat traveled several hours before locating and tying up to the ship. (Tr. pp. 100, 132-34, 169-70, 176). It was determined that the clam boat was not large enough to transport all the marijuana and that two trips would be necessary. (Tr. pp. 99, 136). For 1-1/2 hours, marijuana was off-loaded onto the clam boat, and twice during this process, the clam boat smashed into the ship and was damaged. (Tr. pp. 99, 134, 170). The clam boat returned to the dock, and the first load of marijuana

was unloaded; however, the captain of the clam boat refused to make a second trip because of the damage sustained during the first trip. (Tr. pp. 99, 100).

According to Mr. Cejas, he decided to contact Mr. Myers to discuss the captain's refusal to make a second trip. (Tr. pp. 100-01). However, Mr. Cejas did not have Mr. Myers' telephone number, did not know where he lived, and did not "know anything about the man". (Tr. p. 100). At trial, Mr. Cejas did not remember ever having learned Mr. Myers' name. (Tr. pp. 74, 243). Mr. Cejas testified that he obtained Mr. Myers' telephone number from Lester and that he called Mr. Myers in Florida at about eight or nine o'clock in the morning. (Tr. pp. 101, 105, 110). According to Mr. Cejas, this was the only conversation he had with Mr. Myers other than in their three meetings. (Tr. pp. 61-62). His testimony regarding the telephone conversation with Mr. Myers was as follows:

> A Well, we -- basically the conversation was that I told him, "Look, I have all these things out there, and I have to do something with it, and I've heard that the boat doesn't want to go out again"; and he literally said, "Well, I had a lot of damages done to the boat, and I don't want it to go out there again."
>
> Q Did the subject of money come up?
>
> A Well, I believe he said he would like to get paid, and the conversation might have gotten a little heated, and I said that he had nothing coming because of the situation that he had put me in at that particular moment.

Q And do you recall any other aspects of the conversation?

A Well, basically -- you know -- that he didn't care what happened to what's out there, he cared about his boat.

(Tr. p. 106).

Mr. Cejas testified that he called from a pay phone, but no other evidence was offered to corroborate his testimony. (Tr. pp. 105-106). The Commonwealth did introduce records of telephone calls made to the dock in Cape Charles and to Mr. Myers' residence in Marathon, Florida, from a room at the Ocean Island Hotel in Virginia Beach. (Tr. p. 147; Commonwealth's Exhibit 16). The room was registered to "William Maimone", and Mr. Cejas testified that this was one of his aliases. (Tr. pp. 90-91, 146-47; Commonwealth's Exhibit 4). However, he testified that he did not call Mr. Myers from the Ocean Island Hotel. (Tr. p. 256). Mr. Cejas' address book, containing Mr. Myers' telephone number and the telephone number at the dock, was also introduced into evidence. (Tr. pp. 101-02, 110; Commonwealth's Exhibit 6).

Mr. Cejas was a convicted felon who had been granted immunity from prosecution in Virginia in exchange for his testimony at Mr. Myers' trial. (Tr. pp. 59, 262-63). At the time of Mr. Myers' trial, Mr. Cejas had already served eight years in the penitentiary as a result of marijuana trafficking in Georgia, with twelve years of parole time still pending. (Tr. pp. 64, 271-272). The Commonwealth conceded that there were some reasons to question the credibility of Mr. Cejas. (Tr. p. 283).

In an interview conducted by Melvin Wayne Hollowell of the Virginia State Police on August 20, 1986, Mr. Myers denied any knowledge of or participation in the unloading of marijuana at his dock. (Tr. pp. 151-52, 157-58).

During the trial of this case in March 1992, Mr. Myers objected to hearsay testimony by Mr. Cejas regarding statements made by Lester ten years earlier in 1982. (Tr. pp. 71, 77, 101, 109, 114, 115-16, 216-26, 242). The Commonwealth contended that it had made a prima facie case of Mr. Myers' participation in a conspiracy with Lester and that the hearsay testimony was therefore admissible as statements by a co-conspirator; the trial court agreed with the Commonwealth and admitted Mr. Cejas' hearsay testimony regarding Lester's statements in 1982. (Tr. pp. 216-26). Pursuant to the trial court's ruling, the Commonwealth was allowed to introduce the following hearsay testimony by Mr. Cejas:

BY MR. JONES:

Q What did [Lester] say to you?

A Well, he asked me -- you know -- that the owner of the boat, Mr. Meyers, wanted some money; and I told him that the most that I could give him was to repair his boat because we had a lot of expenses, the trial and everything that was going to come, and attorneys. So, therefore, what I did is that I gave him maybe around $200,000, and I told him that was it for him to do with that money whatever he wanted to do.

Q Do you know what Lester did with the money?

A I have no idea what he did with the money.

Q Now, the first time you heard about Mr. Meyers was?

MR. MORCHOWER Objection to any leading question.

THE COURT: Well, I don't know that it is a leading question.

MR. JONES: Pardon me?

THE COURT: Mr. Cejas, don't answer the question until it's ruled on.

Go ahead. I don't know what you're asking.

MR. JONES: I'm recapping some testimony from yesterday.

MR. MORCHOWER: I object to any recapping of testimony from yesterday. It's not proper.

THE COURT: Ask the question.

BY MR. JONES:

Q When was the first time you heard about Mr. Meyers?

A Through Lester before the load. I don't remember exactly when.

Q This is after the New Jersey load?

A Exactly.

Q But before the Cape Charles load?

A Uh-huh.

Q What exactly did Mr. -- did Lester say about Mr. Meyers? Did he identify him by name, for example?

A No. He just told me he knew somebody that could do what I wanted.

Q Did he say where this man was?

A That the territory was Virginia where we were going to do this.

Q What else did he say about the man if anything?

A This particular man owned the docks and the boats, that we had a -- there was a possibility that we had access to that.

Q Before you met with Mr. Meyers and with Mr. Lester, had Lester spoken -- did Lester tell you he had spoken to Mr. Meyers himself?

A Well, there was a point -- a point in time where he said that we had a meeting with this particular person and, therefore, -- there again, I assumed that definitely he had already met with Meyers and discussed things with Meyers.

Q And when he told you you were going to be meeting with this man, who was it he said you were meeting with?

A The person who was going to provide the docks; and at that time, I don't know whether he mentioned his name was Meyers or not. I don't think there was a need to mention the name.

Q This is, of course --

A Ten years ago now, exactly.

MR. JONES: That's all I have for Mr. Cejas.

(Tr. pp. 242-244).

At the conclusion of all the evidence, Mr. Myers moved the trial court to strike the Commonwealth's case as there was insufficient evidence of Mr. Myers' knowing that the people renting his clam boat and dock were using them to transport marijuana. (Tr. pp. 277-83; App., infra, A-4). The trial court overruled Mr. Myers' motion to strike, and the case went to the jury. (Tr. pp. 284-85; App., infra, A-4).

The jury found Mr. Myers guilty of conspiracy to distribute more than five pounds of marijuana and recommended a sentence of ten years in the state penitentiary. (Tr. p. 360; App., infra, A-5). Mr. Myers renewed his motion to strike, which the trial court denied, and moved the court to set aside the jury verdict as contrary to the law and the evidence, which motion the trial court also denied. (Tr. pp. 362-63; App., infra, A-5). The case was continued pending preparation of a presentence report, and on May 8, 1992, the trial court imposed the sentence recommended by the jury. (Tr. p. 364; App., infra, A-5, A-7).

B. The Appeal

On appeal to the Court of Appeals of Virginia, Mr. Myers argued in his brief: (1) that the trial court erred in admitting into evidence the hearsay statements of an alleged co-conspirator, and (2) that the evidence was not sufficient to convict Mr. Myers of conspiracy to distribute more than five pounds of marijuana. (App., infra, A-10, A-11). The Court of Appeals of Virginia rejected both of these arguments, holding that "reference was made during [Mr. Cejas' third meeting with Mr. Myers] to the word 'weed' or whatever was the common parlance of the day for marijuana" and that "exclusive of the objected-to hearsay, the Commonwealth presented evidence from which the finder of fact could reasonably infer that appellant agreed to the conspiracy. . . ." (App., infra, A-12, A-15). Mr. Myers raised the same two issues in his petition for appeal to the Supreme Court of Virginia, which summarily refused his appeal. (App., infra, A-1).

REASONS FOR GRANTING THE WRIT

The decision below presents two issues worthy of this Court's review: (1) whether the Fourteenth Amendment's guarantee of due process is violated when a lessor of transportation facilities used by its lessees to distribute contraband is convicted of conspiring with them without any evidence that he knew of their purpose, and (2) whether a defendant's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law are violated when a hearsay declarant is not present for cross-examination at trial, there is no showing that the declarant is unavailable or that the defendant engaged in a conspiracy, and the hearsay is nevertheless admitted as statements by a co-conspirator. In addressing these issues, Virginia's appellate courts have decided important questions of federal law in a way that conflicts with

relevant decisions of this Court and which should be settled by this Court.

I. THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS IS VIOLATED WHEN A LESSOR OF TRANSPORTATION FACILITIES USED BY ITS LESSEES TO DISTRIBUTE CONTRABAND IS CONVICTED OF CONSPIRING WITH THEM WITHOUT ANY EVIDENCE THAT HE KNEW OF THEIR PURPOSE.

In Jackson v. Virginia, 443 U.S. 306 (1979), this Court stated:

> "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.
>
> [This] doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact-finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury . . . [S]uch an occurrence has traditionally been deemed to require reversal of the conviction."

Jackson, 443 U.S. at 316-17. The burden of proving guilt beyond a reasonable doubt establishes a fundamental and substantive constitutional standard. The jury in the instant case failed to apply rationally the reasonable doubt standard to the facts in evidence. Because the evidence did not establish beyond a reasonable doubt that Mr. Myers knew his boat and dock were being used to off-load marijuana, his conviction violated the due process guaranteed by the Fourteenth Amendment and must therefore be reversed.

In Cameron v. Commonwealth, 211 Va. 108, 175 S.E.2d 275 (1971), the Supreme Court of Virginia stated:

> It is well settled in Virginia that to justify conviction of a crime, it is not sufficient to create a suspicion or probability of guilt, but the evidence must establish the guilt of an accused beyond a reasonable doubt. It must exclude every reasonable hypothesis except that of guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

211 Va. at 110. The evidence in the instant case was not inconsistent with the innocence of Arthur Richard Myers, and there is a very reasonable hypothesis of innocence which is fully consistent with the evidence in this case, namely, that Mr. Myers believed he was renting his boat and dock for the off-loading of seafood or other merchandise and did not know that Mr. Cejas and his associates were actually using them for the transport of marijuana. For an accused to be found guilty of conspiracy to distribute marijuana in Virginia, the Commonwealth must prove beyond a reasonable doubt that he was aware of the identity of the substance contemplated by the agreement. See Graves v. Commonwealth, 234 Va. 578, 581, 363 S.E.2d 705 (1988). To establish an accused's awareness of

the identity of a controlled substance, the Commonwealth must point to evidence of acts, statements or conduct of the defendant or other facts and circumstances which tend to show he was aware of the identity of the controlled substance. See Garland v. Commonwealth, 225 Va. 182, 300 S.E.2d 783 (1983); Hodge v. Commonwealth, 7 Va. App. 351, 374 S.E.2d 76 (1988). Absent this evidence, there is a failure of proof. See, e.g., Drew v. Commonwealth, 230 Va. 471, 388 S.E.2d 844 (1986); Powers v. Commonwealth, 227 Va. 474, 316 S.E.2d 739 (1984). In the instant case, there was no evidence that Mr. Myers was aware of the character of the merchandise being off-loaded by Mr. Cejas and his associates.

The only evidence of acts, statements or conduct by Mr. Myers regarding the agreement in this case came from the testimony of Mr. Cejas. There was nothing in the testimony of Mr. Cejas to establish that Mr. Myers knew his boat and dock would be used for the off-loading of marijuana.

In affirming Mr. Myers' conviction, the Court of Appeals of Virginia referred to Mr. Cejas' third meeting with Mr. Myers and stated, "Although they still refrained from using the word marijuana ... reference was made during this meeting to the word 'weed' or whatever the common parlance of that day was for marijuana." (App., infra, A-12). Mr. Myers respectfully submits that the Virginia Court of Appeals mischaracterized the testimony of Mr. Cejas. Regarding the third meeting, Mr. Cejas actually testified as follows:

> Well, it's been ten years ago; so exactly, I can't pinpoint exactly how the conversation went as to how -- what were the words used. Basically he was interested in knowing whether the trip was coming in. He might have referred to it as weed or whatever else that was the linguistic back in those days -- you know.

> Like I say, I'm assuming he knows what's going on. We got people around us. We're not discussing marijuana -- you know -- or any other thing around people. So this is basically what happened.

(Tr. p. 83) (emphasis supplied). Mr. Cejas did not say that Mr. Myers in fact referred to the word "weed" or other common parlance for marijuana; he did not even say that Mr. Myers "may have" so referred. Mr. Cejas testified that Mr. Myers "might have" used such a term. In this context, the word "might" is a modal verb expressing a possibility; its use expresses "less probability or possibility than may," a closely related modal verb also used to express possibility. See Webster's Ninth New Collegiate Dictionary (Merriam-Webster, Inc. 1983). It is inherent in Mr. Cejas' testimony that Mr. Myers may not have referred to "weed" or some other such term.

Elsewhere in its opinion affirming Mr. Myers' conviction, the Court of Appeals of Virginia stated that "[n]o explanation was made relative to the telephone calls from and to his home and Cejas's motel." (App., infra, A-13). Mr. Myers would respectfully submit that there was nothing in the evidence regarding those telephone calls to indicate that Mr. Myers was aware that Mr. Cejas and his cohorts were transporting marijuana. In any event, it was not Mr. Myers' burden to prove his innocence but the Commonwealth's to prove his guilt, and no inference can be drawn from any lack of explanation by him regarding the calls. See Clemner v. Commonwealth, 208 Va. 661, 664, 159 S.E.2d 664 (1968).

Because there was no direct evidence that Mr. Myers agreed to the use of his boat and dock for the off-loading of marijuana, his conviction is based entirely on circumstantial evidence. While circumstantial evidence is as competent as direct evidence, where proof rests entirely on circumstantial evidence, "'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and

exclude every reasonable hypothesis of innocence.'" Burchette v. Commonwealth, 15 Va. App. 432, 435, 425 S.E.2d 81 (1992) quoting Garland v. Commonwealth, 225 Va. 182, 184, 300 S.E.2d 783 (1983).

> "To accomplish that, the chain of necessary circumstances must be unbroken and the evidence as a whole must satisfy the guarded judgment that both the corpus delicti and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis and to a moral certainty . . . ."

Clodfelter v. Commonwealth, 218 Va. 619, 623, 238 S.E.2d 820 (1977), quoting Laprade v. Commonwealth, 191 Va. 410, 418, 61 S.E.2d 313 (1950). Whenever the evidence leaves indifferent which of several hypotheses is true, or merely establishes only some finite probability in favor of one hypothesis, such evidence does not amount to proof of guilt beyond a reasonable doubt. Sutphin v. Commonwealth, 1 Va. App. 241, 248, 337 S.E.2d 897 (1985); see also Harrell v. Commonwealth, 11 Va. App. 1, 11, 396 S.E.2d 680 (1990). If facts are susceptible of two different interpretations, "one of which is consistent with the innocence of the accused, the jury or the judge trying the case cannot arbitrarily adopt the interpretation which incriminates him." Williams v. Commonwealth, 193 Va. 764, 772, 71 S.E.2d 73 (1952). The evidence in the present case did not exclude the very reasonable hypothesis that Mr. Myers believed his boat and dock were being used for a purpose other than the off-loading of marijuana: Mr. Myers was in the clam business, and his boat and dock were routinely used at night to off-load merchandise to waiting trucks. The chain of circumstances necessary to prove the offense is not unbroken, and the evidence in the present case does not prove to the exclusion of any other rational hypothesis

and to a moral certainty that Mr. Myers knew Mr. Cejas' purpose in renting his boat and dock.

There was an abundance of evidence that tended to prove Mr. Myers rented his boat and dock to Mr. Cejas, but there was no evidence that he knew what merchandise Mr. Cejas was transporting. Mr. Myers' conviction, without such evidence, was in violation of the due process guaranteed by the Fourteenth Amendment. This Court should review the refusal of the courts below to reverse Mr. Myers' conviction.

II. A DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW ARE VIOLATED WHEN A HEARSAY DECLARANT IS NOT PRESENT FOR CROSS-EXAMINATION AT TRIAL, THERE IS NO SHOWING THAT THE DECLARANT IS UNAVAILABLE OR THAT THE DEFENDANT ENGAGED IN A CONSPIRACY, AND THE HEARSAY IS NEVERTHELESS ADMITTED AS STATEMENTS BY A CO-CONSPIRATOR.

The general rule excluding hearsay existed at common law and is a fundamental principle of Anglo-American jurisprudence; it is found in the rules of evidence governing trials in all State and federal courts. See generally McCormick on Evidence § 244 (4d ed. 1992); 29 Am. Jur. 2d, Evidence § 493; see also Donnelly v. United States, 228 U.S. 243, 272-73, reh'g denied, 228 U.S. 708 (1913); Doe v. Thomas, 227 Va. 466, 318 S.E.2d 382 (1984); Fed. Rule Evid. 802; American Law Institute Model Code of Evidence, Rule 501. The basis for the rule lies in the fact that hearsay testimony is not subject to the tests which can ordinarily be applied for the ascertainment of the truth of testimony. See, e.g., Donnelly, 228 U.S. at 273. The declarant is not present and available for cross-examination,

and both the court and the jury are without opportunity to test the credibility of hearsay statements by observing the demeanor of the person who made them. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495-96 (1951); Donnelly, 228 U.S. at 273. Exclusion is particularly appropriate when the hearsay statement was made without the sanction of an oath and without the declarant being under a responsibility to answer for the crime of perjury in making a willful falsification. See Donnelly, 228 U.S. at 273.

In Richardson v. Marsh, 481 U.S. 200 (1987), this Court stated:

> The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The right of confrontation includes the right to cross-examine witnesses.

Richardson, 481 U.S. at 206 (citations omitted). The Court in Ohio v. Roberts, 448 U.S. 56 (1980), considered the relationship between the Sixth Amendment's Confrontation Clause and the general rule excluding hearsay.

This Court stated in Roberts:

> The historical evidence leaves little doubt . . . that the [Confrontation] Clause was intended to exclude some hearsay. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross-examination."

Roberts, 448 U.S. at 63 (citations omitted). Continuing, this Court in Roberts quoted from the decision in Mattox v. United States, 156 U.S. 237, 242-43 (1895), for the principle that the Confrontation Clause envisions

> "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Roberts, 448 U.S. at 63-64. These means of testing accuracy are so important "that the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact finding process."'" Roberts, 448 U.S. at 64 (citations omitted).

This Court has held that the Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay.

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse

> evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason for the general rule."

Roberts, 448 U.S. at 65 (citations omitted). In Mancusi v. Stubbs, 408 U.S. 204 (1972), which the Court cited with approval in Roberts, 448 U.S. at 65-66, this Court stated:

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant" and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability."

Mancusi, 408 U.S. at 213 (citations omitted). Regarding this "indicia of reliability" requirement, the Court in Roberts stated that the requirement is applied

> principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values" and "stem from the same roots" . . .

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66 (citations omitted). At the trial of the instant case in 1992, there was no showing that Lester was unavailable or that his out-of-court statements to Mr. Cejas in 1982 fell within a firmly rooted hearsay exception, and the admission of Cejas' testimony regarding those statements was therefore in violation of the Sixth and Fourteenth Amendments.

The Commonwealth had the burden of proving that the hearsay testimony of Mr. Cejas was admissible.

> A party who relies upon an exception to an exclusionary rule of evidence bears the burden of establishing admissibility. "One seeking to have hearsay declarations of a witness admitted as an exception to the general rule must clearly show that they are within the exception."

Doe v. Thomas, 227 Va. at 472 (citations omitted). There was no showing by the Commonwealth that Lester was unavailable, and this fact alone makes the admission of Mr. Cejas' hearsay testimony a violation of the Sixth and Fourteenth Amendments.

In allowing Mr. Cejas to testify at the trial in 1992 regarding statements made by Lester in 1982, the trial court held that the Commonwealth had made a prima facie case of Mr. Myers' participation in a conspiracy with Lester and that the

hearsay testimony was therefore admissible as statements by a co-conspirator. However, it is clear from the trial record that the Commonwealth failed to produce any evidence that Mr. Myers knew that the lessees of his boat and dock were transporting marijuana, and therefore no prima facie case of his participation in the conspiracy was made.

In Virginia, the co-conspirator exception to the rule excluding hearsay applies only where two conditions are met: first, that there is evidence, independent of the hearsay sought to be admitted, which establishes a prima facie case that a conspiracy existed and that the defendant participated in it, see United States v. Mitchell, 733 F.2d 327, 329 (4th Cir. 1984); Donahue v. Commonwealth, 225 Va. 145, 154, 300 S.E.2d 768 (1983); Clayton v. Anthony, 6 Rand. (27 Va.) 285, 301 (1828); Stumpf v. Commonwealth, 8 Va. App. 200, 205, 379 S.E.2d 480 (1989); and second, that the acts and declarations sought to be admitted "were done or said in furtherance of the object of the conspiracy." Sands v. Commonwealth, 21 Gratt. (62 Va.) 871, 896 (1872); see also Anderson v. United States, 417 U.S. 211, 219 (1973); Berger v. Commonwealth, 217 Va. 332, 334, 228 S.E.2d 559 (1976); Stumpf v. Commonwealth, 8 Va. App. 200, 205, 379 S.E.2d 480 (1989). Hearsay declarations may not be considered in determining whether a prima facie case for conspiracy has been established; "[o]therwise hearsay would lift itself by its own bootstraps to the level of competent evidence." Poole v. Commonwealth, 7 Va. App. 510, 513, 375 S.E. 2d 371 (1988), quoting United States v. Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980).

In the instant case, the Commonwealth did not establish by independent evidence a prima facie case of Mr. Myers' participation in the conspiracy. Conspiracy is defined as "an agreement between two or more persons by some concerted action to commit an offense." Heacock v. Commonwealth, 228 Va. 397, 407, 323 S.E.2d 90 (1984); Zuniga v. Commonwealth, 7 Va. App. 523, 527, 375 S.E.2d 381 (1988). "There can be no conspiracy without an agreement." Heacock, 228 Va. at 407;

Floyd v. Commonwealth, 219 Va. 575, 580, 249 S.E.2d 171 (1978). "A common design is the essence of the charge [and it must be shown] that the alleged conspirators... had a common interest in the subject with reference to which the conspiracy was formed." Agreement as an Element in Conspiracy, 23 Va. L. Rev. 898, 901 (1938)(emphasis supplied). Thus, for the hearsay evidence to have been admissible at the trial below, the Commonwealth had to establish a prima facie case that Mr. Myers agreed with Lester and Cejas by some concerted action to distribute marijuana.

Prima facie evidence was defined in Babbit v. Miller, 192 Va. 372, 379, 64 S.E.2d 718 (1951), as "evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted." In applying this standard, the Virginia Court of Appeals has quoted with approval the decision in United States v. Scott, 730 F.2d 143, 148 (4th Cir.), cert. denied, 469 U.S. 1075 (1984):

> "[B]efore the court allows into evidence statements made by one defendant against another under the co-conspirator exception, it must find 'the existence of and the [defendant's] participation in the conspiracy' by a fair preponderance of independent evidence."

Cirios v. Commonwealth, 7 Va. App. 292, 301, 373 S.E.2d 164 (1988). The Commonwealth failed to prove by a fair preponderance of evidence that Mr. Myers knew that the lessees of his boat and dock were using them to off-load marijuana, and his Sixth Amendment right of confrontation was therefore violated by the admission of testimony regarding Lester's statements without an opportunity for Mr. Myers to cross-examine Lester.

This Court has held that the Confrontation Clause requires adequate "indicia of reliability" before hearsay is admitted against an accused. Roberts, 448 U.S. at 66. In

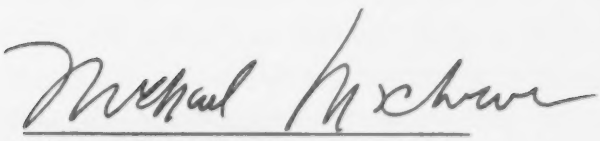
Virginia, there is no statute of limitations for the prosecution of felonies, see Virginia Code § 19.2-8, and the prosecution of Mr. Myers was commenced ten years after the alleged commission of the offense. "Remoteness is a factor to be weighed in determining the indicia of reliability to be accorded hearsay statements," Evans-Smith v. Commonwealth, 5 Va. App. 188, 199, 361 S.E.2d 436 (1987), and it violated the Fourteenth Amendment's guarantee of due process to allow Mr. Cejas to testify regarding statements supposedly made by Lester ten years earlier.

Because no showing was made by the Commonwealth that Lester was unavailable or that Mr. Myers participated in a conspiracy to distribute marijuana, the admission of Mr. Cejas' testimony regarding statements allegedly made by Lester ten years earlier violated Mr. Myers' Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law. Accordingly, this Court should review the refusal of the courts below to reverse Mr. Myers' conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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PETITIONER'S APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 1st day of August, 1995.

Arthur Richard Myers, Jr.,
Appellant,

against

Commonwealth of Virginia
Appellee.

Record No. 942154
Court of Appeals No. 1119-92-1

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

/s/ A.A.
Deputy Clerk

VIRGINIA:

In the Circuit Court of the County of Northampton, on Friday, the 27th day of March, in the year of our Lord, One Thousand Nine Hundred and Ninety Two (1992).

Present: The Honorable N. Wescott Jacob, Judge.

Commonwealth

vs.
Arthur Richard Myers, Jr.
a/k/a Dick Myers
DOB: 06/22/29

Conspiracy to Distribute Marijuana
(DO: on or about 11/82)

On the 16th day of March, 1992, came again the Attorney for the Commonwealth, and Arthur Richard Myers, Jr., a/k/a Dick Myers, age 62, who stands indicted for a felony, to-wit: conspiracy to distribute marijuana (Va. Code §18.2-248.1 and 18.2-256), as charged in the Indictment, appeared according to the conditions of his own recognizance, and came also Glen A. Tyler and Michael Morchower, attorneys of his own choosing.

Whereupon the accused was arraigned and after private consultation with his said attorneys, pleaded NOT GUILTY to Indictment, which plea was tendered by the accused in person, who requested trial by jury.

The Court then impanelled twenty qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the Attorney for the Commonwealth and the attorneys for the defendant each alternately exercised their rights to strike the names of four

venirepersons from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

The Court then impanelled three (3) qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the Attorney for the Commonwealth and the attorneys for the defendant each exercised their rights to strike the name of one (1) venireperson from the panel as provided by law, and the remaining one (1) juror, constituting an alternate juror for the trial of the defendant, was duly sworn.

After opening statements, the court and the jury heard the evidence presented by the Commonwealth. At this time the case was continued until March 17, 1992, at 9:30 o'clock, A.M.

And the defendant is allowed to depart, with his bond continuing in full force and effect, to return to this Court on March 17, 1992, at 9:30 o'clock, a.m.

/s/ N. Wescott Jacob, Judge.

Recorded in Criminal Common Law
Order Book No. 30 p. 275
Northampton County Circuit Court

VIRGINIA:

In the Circuit Court of the County of Northampton, on Friday, the 27th day of March, in the year of our Lord, One Thousand Nine Hundred and Ninety Two (1992).

Present: The Honorable N. Wescott Jacob, Judge.

Commonwealth

vs.

Arthur Richard Myers, Jr.
a/k/a Dick Myers
DOB: 06/22/29

On the 17th day of March, 1992, came again the Attorney for the Commonwealth, and Arthur Richard Myers, Jr., a/k/a Dick Myers, age 62, who stands indicted for a felony, to-wit: conspiracy to distribute marijuana (Va. Code §18.2-248.1 and 18.2-256), as charged in the Indictment, appeared according to the conditions of his own recognizance, and came also Glen A. Tyler and Michael Morchower, attorneys of his own choosing.

The Court and the jury heard further evidence presented by the Commonwealth. At the conclusion of the Commonwealth's evidence, the attorneys for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated in the record, which motion was overruled.

After hearing the evidence, the instructions of the Court and argument of counsel, the alternate juror was excused and the jurors were sent to the jury room to consider

their verdict. They subsequently returned their verdict in open court, in the following words:

> "We the jury find the defendant guilty of conspiring with one or more individuals to distribute in Northampton County, Virginia, marijuana in excess of five (5) pounds as charged in the indictment and fix his punishment at: 10 years.
>
> Fred F. Richardson, III
> Foreman"

Thereupon the jury was discharged by the Court.

The attorneys for the defendant renewed their motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled

The attorneys for the defendant then moved the Court to set aside the verdict, for reasons stated to the record, which motion was overruled, to which ruling the defendant by counsel excepted

The Court, on motion of the defendant by counsel, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, to which time this case is continued.

The Court certifies that at all time during the trial of this case the defendant was present in person and his attorney was likewise present in person and represented the defendant capably.

And the defendant is allowed to depart, with his bond continuing in full force and effect.

/s/ N. Wescott Jacob, Judge.

Recorded in criminal Common Law
Order Book No. 30 P 277
Northampton County Circuit Court

VIRGINIA:

In the Circuit Court of the County of Northampton, on Thursday, the 14th day of May, in the year of our Lord, One Thousand Nine Hundred and Ninety Two (1992).

Present: The Honorable N. Wescott Jacob, Judge.

Commonwealth

v.

Arthur Richard Myers, Jr.
a/k/a/ Dick Myers
DOB: 06/22/29

Sentencing Order

On the 8th day of May, 1992, came again the Attorney for the Commonwealth, and Arthur Richard Myers, Jr., a/k/a Dick Myers, age 62, who was on the 17th day of March, 1992, convicted of a felony, to-wit: conspiracy to distribute marijuana (Va. Code § 18.2 -248.1 and 18.2-256), as charged in the Indictment, appeared according to the conditions of his own recognizance, and came also Michael Morchower, attorney of his own choosing.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report she presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused at least five (5) days prior to this hearing.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, the Court, in accordance with the verdict of the jury, finds the defendant guilty of conspiracy to distribute marijuana and sentences him to confinement in the penitentiary of this Commonwealth for a term of ten (10) years, and further that the Commonwealth do recover against the defendant its costs by it about prosecution in this behalf expended.

And it is further ORDERED that, pursuant to Section 19.2-310.3 of the Code of Virginia, the defendant shall have a sample of his blood taken for analysis.

After pronouncing sentence the Court advised the defendant of his right to petition for appeal to the Court of Appeals of Virginia, and defendant acknowledged that his counsel had advised him of his rights regarding an appeal.

The Court certifies that at all times during the trial of this case the defendant was personally present and his Attorney was likewise personally present and capably represented the defendant.

And the defendant is allowed to depart, with his bond continued in full force and effect, until such time that his

appeal is decided by the Court of Appeals of the Commonwealth of Virginia.

/s/ N. Wescott Jacob, Judge

Recorded in Criminal Common Law
Order Book No. 30 p. 425
Northampton County Circuit Court

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Barrow and Bray
Argued at Norfolk, Virginia

ARTHUR RICHARD MYERS, JR.,
a/k/a DICK MYERS

v.

COMMONWEALTH OF VIRGINIA

Record No. 1119-92-1

MEMORANDUM OPINION*
BY JUDGE JOSEPH E. BAKER
MAY 17, 1994

FROM THE CIRCUIT COURT
OF NORTHAMPTON COUNTY
N. Wescott Jacob, Judge

Michael Morchower (Lee White Kilduff; Morchower, Luxton & Whaley, on brief), for appellant.

Richard B. Smith, Assistant Attorney General (Stephen D. Rosenthal, Attorney General; Leah A. Darron, Assistant Attorney General, on brief), for appellee.

Arthur Richard Myers, Jr. (appellant) appeals from a judgment of the Circuit Court of Northampton County (trial court) that approved a jury verdict convicting him of

* Pursuant to Code § 17-116.010 this opinion is not designated for publication.

conspiracy to distribute marijuana in excess of five pounds. Appellant contends that the trial court erroneously permitted hearsay evidence to be used to prove his involvement as a co-conspirator in the conspiracy to distribute marijuana initiated by Wilfredo Cejas (Cejas) and a person named Lester (Lester), and further asserts that the evidence is insufficient to support the conviction. Finding no error, we affirm the judgment of the trial court.

As to the sufficiency of the evidence being challenged in this appeal, upon familiar principles, we view the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975).

The record shows that prior to the formation of the conspiracy for which appellant stands convicted, Cejas and Lester had been involved in a prior, successful conspiracy to smuggle marijuana from a freighter off the New Jersey coast, using a smaller boat onto which the marijuana was off-loaded, brought ashore and then distributed. Subsequently, Cejas and Lester plotted a similar importation scheme from a freighter that was to lay off the Eastern Shore of Virginia. Cejas was introduced to appellant who owned a clam boat suitable for off-loading marijuana from the freighter, and a dock on the Eastern Shore on which the marijuana could be off-loaded to vehicles for distribution.

Lester, Cejas and appellant first met in a public restaurant located near appellant's clam processing plant. Because they were in a public restaurant used with people, the word "merchandise" was used as a euphemism for marijuana in their discussions. At that meeting, Cejas told appellant that he needed "a boat and a captain, a dock to get the merchandise in." Appellant responded that "Lester will handle

that." Following that meeting, Cejas and Lester drove by appellant's dock and processing plant. Cejas found the facility satisfactory for the smuggling operation.

Cejas's responsibility was to maintain radio contact with the freighter laying offshore and arrange for vehicles to distribute the marijuana after it was off-loaded at appellant's dock. Subsequent to the initial meeting, Cejas met with appellant outside the entrance to appellant's clam processing plant. Cejas expressed his concern to appellant about the progress being made toward the shipment and was assured by appellant that "Lester is taking care of it. Lester is handling it. Don't worry about it."

Approximately one month later, Cejas met with appellant in Florida. On that occasion, appellant was concerned whether "the trip" was still on. During that conversation, Cejas recalled that he reassured appellant, giving him the expected arrival date. Although they still refrained from using the word marijuana in public places, reference was made during this meeting to the word "weed" or whatever the common parlance of that day was for marijuana.

On November 22, 1982, as had been anticipated, the "mother ship" loaded with marijuana lay off the Eastern Shore coast. Between 2:00 and 3:00 a.m., tons of marijuana were off-loaded from the freighter to appellant's clam boat. The clam boat returned to appellant's dock, where the marijuana was off-loaded to the waiting vehicles used for mainland distribution.

A second trip to the freighter was necessary to complete the off-loading; however, appellant's boat had been damaged during the first trip, due to rough seas. Upon hearing that appellant's boat could not be used for the second trip, at approximately 8:00 a.m. that same morning (November 22,

1982), Cejas contacted appellant by telephone at appellant's Florida home. The telephone number at which appellant received the call was (305) 289-1672, registered in appellant's name at his Florida home. Telephone company records contained in this record disclose that, during the period of Cejas's contacts with appellant, several calls were made from that number to the motel from which Cejas operated. In the early morning hours of November 22, 1982, two collect calls from Cejas's motel had been accepted at that number.

During the 8:00 a.m., November 22, 1982 call, Cejas advised appellant that appellant's boat needed to go out a second time but that Cejas had "heard that the boat doesn't want to go out again." In the short period between 3:00 a.m. and 8:00 a.m., appellant obviously had already received a call from someone involved, as appellant responded, "Well, I had a lot of damages done to the boat, and I don't want it to go out there again." Appellant refused to permit further use of his boat. However, Cejas's recollection caused him to believe that appellant asked "to be paid," and he added that subsequently Lester came to Cejas's Florida house and asked for money for appellant. Appellant objected to Cejas's reference to Lester seeking money for appellant and argues that it was not admissible because at that point, and not subsequently, the Commonwealth had failed to prove that appellant was a co-conspirator in the described smuggling operation.

Virginia State Trooper M. W. Hollowell testified that appellant denied "any knowledge of anything that took place there [appellant's place of business] concerning the smuggling activities." Appellant admitted that he was at his Florida home on November 20, 21, and 22, 1982, and that his Florida home telephone number was (305) 289-1672. No explanation was made relative to the telephone calls from and to his home and Cejas's motel.

Virginia State Trooper Gene Childress testified that Cejas gave him a description that matched appellant, that he identified the restaurant of the first meeting and the clam dock, and that Cejas selected appellant's photograph from a photographic array.

Appellant concedes that the Commonwealth established that Lester and Cejas formed an illegal conspiracy to import marijuana from a freighter anchored off the Virginia coast. We need only determine whether evidence supports the trial court's finding that appellant joined that conspiracy so as to permit the statements made by Lester, out of appellant's presence, to be admissible hearsay.

When the Commonwealth has established a prima facie case that a conspiracy has been formed, statements made by co-conspirators are admissible against the other conspirators, even though they are not made in the presence of that conspirator. Floyd v. Commonwealth, 219 Va. 575, 581-82, 249 S.E.2d 171, 175 (1978); Stultz v. Commonwealth, 6 Va. App. 439, 442, 369 S.E.2d 215, 217 (1988); see also Amato v. Commonwealth, 3 Va. App. 544, 553, 352 S.E.2d 4, 9 (1987). The prima facie case may be proved by circumstantial evidence. Stultz, 6 Va. App. at 443, 369 S.E.2d at 217. A formal agreement need not be shown; a conspiracy may be inferred form the overt actions of the parties and "a common purpose and plan may be inferred from a 'development and collocation of circumstances.'" Floyd, 219 Va. at 581, 249 S.E.2d at 175 (quoting United States v. Godel, 361 F.2d 21, 23 (4th Cir.), cert. denied, 385 U.S. 838 (1966)). Prima facie evidence is "evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted." Cirios v. Commonwealth, 7 Va. App. 292, 300, 373 S.E.2d 164, 167 (1988) (quoting Babbit v. Miller, 192 Va. 372, 379-80, 64 S.E.2d 718, 722 (1951)).

Considering all the circumstances shown, we find that from the evidence contained in this record exclusive of the objected-to hearsay, the Commonwealth presented evidence from which the finder of fact could reasonably infer that appellant agreed to the conspiracy to import and distribute tons of marijuana from a site on the Eastern Shore of Virginia. Therefore, we find that the trial court did not err in admitting the statements made by Lester to Cejas.

> [L]iability as a conspirator is not dependent on knowledge of the entire scope of the conspiracy. Knowledge need not extend to all the details of the conspiracy, the identity of the other conspirators, the part each member of the conspiracy is to play, or how the spoils of the conspiracy are to be divided. When one accedes to the conspiracy he sanctions what may have been previously done or said by the other in furtherance of the common object.

Amato, 3 Va. App. at 552-53, 352 S.E.2d at 9 (citations omitted). We further find that the evidence is sufficient to prove that the conspiracy was formed and carried out as planned.

> The elements of a conspiracy may be proved by circumstantial evidence. Circumstantial evidence is as acceptable to prove guilt as direct evidence, and in some cases, such as proof of intent or knowledge, it is practically the only method of proof. "'[A] common purpose and plan may be inferred from a development and collocation of circumstances.'" "Where it is shown that the defendants by their acts pursued the same object, one performing one part and the other

> performing another part so as to complete it or with a view to its attainment, the jury will be justified in concluding that they were engaged in a conspiracy to effect that object."

Id. at 552, 352 S.E.2d at 9 (citations omitted).

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 30th day of June 1994.

Arthur Richard Myers, Jr.,
a/k/a/ Dick Myers,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 1119-92-1
Circuit Court No. C92-02047

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of May, 1994 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17-116.02(D).

A Copy,
Teste:
Richard R. James, Clerk
By: /s/ Cynthia L. McCoy
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 30th day of August 1994.

Arthur Richard Myers, Jr.,
a/k/a/ Dick Myers,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 941404
Court of Appeals No. 1119-92-1

From the Court of Appeals of Virginia

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17(a)(2).

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 16th day of November, 1994.

Arthur Richard Myers, Jr.,
Petitioner,

against

Director of the Department of Corrections,
Respondent.

Record No. 941676

Upon a Petition for a Writ of Habeas Corpus

On October 5, 1994 came the petitioner, by counsel, and filed a petition for a writ of habeas corpus in the above-styled case.

On consideration whereof, and it appearing to the Court from the answer of the Attorney General of Virginia that Arthur Richard Myers, Jr. was denied his right of appeal, a writ of habeas corpus is hereby awarded the petitioner, with leave granted him to file a notice of appeal and to apply to this Court for an appeal from the order entered on June 30, 1994 by the Court of Appeals of Virginia.

On further consideration whereof, it is ordered that all computations of time as required by the rules of this Court and applicable statues shall commence on the date of entry of this order or, if the said Arthur Richard Myers, Jr. be otherwise entitled to appointed counsel upon this appeal, from the date

of entry of the order of the circuit court so appointing counsel, whichever date shall be later.

The clerk of this Court shall certify copies of this order to the petitioner, to counsel, to the respondent, to the Clerk of the Circuit Court of Northampton County, to the Attorney General of Virginia and to the Clerk of the Court of Appeals of Virginia, which certification shall have the same force and effect as if a writ of habeas corpus were formally issued and served.

A Copy,

Teste:
David B. Beach, Clerk

By: /s/ A.A.
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of September, 1995.

Arthur Richard Myers, Jr.,
Appellant,

against

Commonwealth of Virginia
Appellee.

Record No. 942154
Court of Appeals No. 1119-92-1

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of August, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Koontz did not participate in the consideration of this case.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF NORTHAMPTON

COMMONWEALTH OF VIRGINIA,	)	
	)	RECORD
v	)	C-92-02047
	)	
ARTHUR RICHARD MEYERS, JR.,	)	
Defendant.	)	

Stenographic transcript of proceedings had upon the trial of the above-entitled cause in said court on March 16, 1992, before the Honorable N. Wescott Jacob, judge of said court, and jury.

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APPEARANCES: Mr. Bruce D. Jones, Jr., Commonwealth's Attorney.

Morchower, Luxton & Whaley (Mr. Michael Morchower and Ms. Lee White Kilduff) and Tyler, Custis, Lewis & Dix (Mr. Glen A. Tyler), attorneys for the defendant.

MR. JONES: Well, I'm not exactly sure what the issue is here. I'm not here right now trying to get any statements out of Lester, I will tell Your Honor.

THE COURT: You are not?

MR. JONES: No. I want to make it clear what my position is right now. I submit on behalf of the

Commonwealth that we have made a prima facie case of a conspiracy, and that in fact we have.

THE COURT: I'm not sure I understood you. You say you're not trying to get in any statements made by Lester.

MR. JONES: I will be happy to get in statements by Lester, but I do not think we need these statements from Lester to even get through a motion to strike, for example.

THE COURT: We're not on a motion the strike now. You haven't finished evidence.

MR. JONES: Let me put it like this.

THE COURT: This isn't a motion to strike. What I thought this was -- my understanding of the issue which we were going to take up is whether or not hearsay statements of this man, Lester, are admissible; and as I pointed out this morning, it's my understanding of the law that they are not admissible until you have made out a prima facie case of a conspiracy. That's what we --

MR. JONES: And I assert --

THE COURT: -- are attempting to the determine right now.

MR. JONES: I assert to Your Honor now we have made a prima facie case; and in support of that proposition, I make the following observations. One, at this point, of course, it's undisputable that the marijuana came in over Mr. Meyers' dock. Two, at this point, it is not disputed that it came in on Mr. Meyers' boat; and the evidence is he was the man who had control of this boat.

We have Wilfredo Cejas meeting with this man three times, and he thought they were talking about the importation of marijuana. That was his clear evidence.

We have the telephone calls -- Your Honor will not have seen these things, but we have the records in place right now that illustrate three telephone calls from Room 116 of the Ocean Isles Motel, occupied by Wilfredo Cejas and the others that Your Honor heard about to Mr. Meyers' home in Florida.

The records will also reflect, just to corroborate Mr. Cejas' telephone calls to the dock, and also there are telephone calls -- a telephone call from that number, 289-1672, to the motel. We can prove that.

Marijuana came in and out over his dock. We have a smuggler, Wilfredo Cejas, with a coded phone book that has Mr. Meyers' both dock number and home number in Florida.

He had described the conversation when the -- the load went sour. He described the conversation that he had with Mr. Meyers.

All in all, it seems to me that we have made far more than a prima facie case. I fully expect this will convince the jury, as a matter of fact, without more that Mr. Meyers is guilty of conspiracy to distribute marijuana in Northampton County.

MR. MORCHOWER: Your Honor, I certainly take issue. I think what the Commonwealth has established is suspicion at the most. What they have, Your Honor is -- let's assume for the sake of argument that they have made a prima facie showing that marijuana was unloaded at the dock.

THE COURT: Well, there's no question about that. The issue is whether or not they made a prima facie case of conspiracy with the defendant.

MR. MORCHOWER: They haven't, Your Honor. Their case can rise no higher than Wilfredo. Wilfredo, Your Honor, has made certain assumptions; and every phrase he used in reference to Mr. Meyers, he prefaced it by saying I assume, I understood; and he had no conversations with Mr. Meyers at any time in which marijuana was discussed.

They met supposedly the first time at a restaurant. Lester was present; and because people were there, Wilfredo says we didn't have any discussion about marijuana. Conversation--

THE COURT: He called it merchandise.

MR. MORCHOWER: Merchandise. And there's -- no one has testified that that was a code that Wilfredo understood was used by the three parties.

There's also -- in that same tenor, the same conversation in form and substance was repeated at a plant facility, and then they met allegedly on a boat and had a conversation. Nothing was discussed other than Lester is aware of the arrangements or words that the merchandise -- nothing about marijuana.

He assumed Meyers was talking about marijuana. There's no testimony that that assumption was valid. There's nothing to suggest that Mr. Meyers knew marijuana was coming, was expecting it, made arrangements for it, agreed that marijuana would arrive, be unloaded at his dock.

The phone calls add up to nothing because we don't know who called, we don't know who spoke, and we don't know what the tenor of the conversation was because Wilfredo says he made only one call, and there's no record of that call.

MR. JONES: As a matter of fact, there's a collect call from Virginia Beach to that number at exactly the same time he says. I don't assert that that was him, but the records will reflect that.

THE COURT: Mr. Cejas?

MR. MORCHOWER: Cejas made one phone call.

THE COURT: He said I talked to him once.

MR. MORCHOWER: There's no record of that phone conversation. These records -- he said the phone call was made not from Virginia Beach.

MR. JONES: He did not say that.

MR. MORCHOWER: He did not say that?

MR. JONES: He said from Virginia Beach.

MR. MORCHOWER: So the phone calls add up -- do not support any of the testimony of Wilfredo in terms of marijuana. Was there an agreement between Lester, Wilfredo and Mr. Meyers that marijuana would be -- would arrive at the dock and be unloaded at the dock, and there's no testimony.

You have three brief meetings. Nothing was discussed of any criminal nature, and no words were used. No gestures were used to suggest that marijuana was expected by Mr.

Meyers, that he authorized any marijuana cargo to arrive, that he participated in any way, shape or form.

The Commonwealth further introduced evidence that when he was interviewed, he denied any marijuana activities, denied any knowledge of it, denied any participation in it. That's their evidence, introduced by them.

When you consider all the evidence, Your Honor, there's a possibility that Mr. Meyers had marijuana in his head; but possibilities are not sufficient -- is not sufficient evidence; and it's not what Wilfredo thinks or believes. He made certain assumptions. It was not specified.

You got this missing witness, Lester, who apparently made the arrangements with Mr. Meyers, according to Wilfredo -- and we don't have him here to support Wilfredo, and you only have Wilfredo, who's a convicted felon, who's telling His Honor they met on three occasions, the meetings were brief, and there were people around, that nothing was discussed of a criminal nature.

That's the sum and substance. The phone records don't add up, don't support any criminal activity between Mr. Meyers -- if he spoke. The fact you have a phone and that phone is dialed doesn't mean he dialed the phone. Doesn't mean he dialed it, he participated with the unloading activities that occurred on November 22nd; and even given all the Commonwealth's inferences, they are trying to boot strap their case by Wilfredo; and he hasn't delivered in this courtroom what was expected of him because he doesn't say in any way, shape, or form that there was criminal activity afoot, that we discussed marijuana, we discussed any plan to import marijuana across the ocean, to unload it at Mr. Meyers' dock.

The Commonwealth has been given every opportunity with all these unloaders and all these witnesses; and with all these years that have passed, there's no witness who can say Dick Meyers participated in conversations in which marijuana was discussed.

MR. JONES: May I make an observation?

THE COURT: Yes, sir.

MR. JONES: First of all, just Mr. Cejas said Mr. Meyers may have used the word weed, I think he said, about the Pier 66 conversation.

Setting that aside, obviously we're not here on a preponderance of the evidence or beyond a reasonable doubt or anything of that sort. We're here right now -- I think right now -- talking about prima facie case.

This is a circumstantial case. We have three conversations with Wilfredo Cejas, conversations with this man Lester. We have telephone conversations with this man Lester. We have telephone conversations going back and forth between Mr. Meyers and where we know the smugglers are and direct testimony about telephone conversations between Cejas and Mr. Meyers.

We don't have anybody who can say we saw it, and -- that's right, we got the words from Cejas; but we have these conversations; and now we have, as a result, I dare say every member of the jury will believe that as a result of this, we got marijuana coming off a big freighter onto Mr. Meyers' clam boat and onto Mr. Meyers' clam dock.

It is a circumstantial case. When you add up the telephone calls, the testimony of Mr. Cejas and so on, and the

proof of the marijuana, incidentally, I dare say -- I dare say we have made a prima facie case and that the jury will convict this man, given an opportunity to do so.

So I would hope -- I don't know if Your Honor would agree or not agree, but I think that this -- I know I keep saying motion to strike and everybody else says prima facie case.

THE COURT: This isn't a motion to strike.

MR. JONES: I know.

THE COURT: Motion the strike is when you rest.

MR. JONES: We're going to reach a motion to strike. I know that, obviously, if we don't make a prima facie case, we don't get through the motion to strike.

I will tell Your Honor that I can connect up these phone calls, and I can connect up the MARY JANE, but I do not have more than Wilfredo Cejas; and I submit it is enough with all the other circumstances and the telephone numbers and telephone calls.

THE COURT: The Commonwealth, of course, must depend entirely on Wilfredo Cejas. We've heard a lot of evidence, but none of it ties the defendant into any conspiracy other than Mr. Cejas' testimony. He testified he met with him three times and talked to him on the telephone once.

Now, the first time he met with him with Lester, who is -- he says was the man who arranged the place for the marijuana to come in, and there was no question about him being a co-conspirator with Cejas. So they met with Meyers at the restaurant, and they had a very short conversation in which they -- he said he needed a place to -- a dock and a boat to

bring the merchandise in. Now, that in itself by itself probably would not be enough to show any conspiracy.

The second time he met with him, he went to the plant. Lester was with him again. They had, I gather, toured the plant and talked about the plant. Very little was said about this deal until the very end, and he said something about it, and Meyers said Lester would take care of it. Take care of what? That in itself I do not think would be enough to show conspiracy.

The third time they met with him it was at Pier 66 in Fort Lauderdale, and there he said the defendant wanted to make sure the trip was on. What trip was on? That in itself I question would be enough to take care of any conspiracy.

On the telephone, he told him the defendant said his boat was damaged and he wasn't going back again; and this was after the first load was brought in. Now, these statements in themselves -- what we've got to show that was shown -- that maybe the statements themselves were not enough by themselves to show a conspiracy; but when we couple this with the evidence that the boat owned by Mr. Meyers went out, brought the marijuana into his dock, and unloaded it, I think lends a reasonable inference that Mr. Meyers knew that Mr. Cejas wanted when he talked to him at the restaurant, and understood and knew what trip he meant and knew what he meant, that he wasn't going back to the boat.

So I'm going to rule that Mr. Lester's hearsay statements are admissible as a co-conspirator.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF NORTHAMPTON

COMMONWEALTH OF VIRGINIA,	)	
	)	RECORD
v	)	C-92-02047
	)	
ARTHUR RICHARD MEYERS, JR.,	)	
Defendant.	)	

Stenographic transcript of proceedings had upon the trial of the above-entitled cause in said court on March 17, 1992, before the Honorable N. Wescott Jacob, judge of said court, and jury.

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APPEARANCES: Mr. Bruce D. Jones, Jr., Commonwealth's Attorney.

Morchower, Luxton & Whaley (Mr. Michael Morchower and Ms. Lee White Kilduff) and Tyler, Custis, Lewis & Dix (Mr. Glen A. Tyler), attorneys for the defendant.

MR. MORCHOWER: On the motion to strike, if I may at this time suggest to the court that there is insufficient evidence when you consider the fact that the Commonwealth has the burden of proof and must at this point by a preponderance -- or by prima facie case standard, the prima facie standard we suggest to the court has not been met.

The allegation is a conspiracy. The Commonwealth must prove an agreement between the defendant and the co-conspirators, who are Lester and Cejas -- Wilfredo Cejas. Your Honor had an opportunity to consider the testimony of Mr. Cejas. His testimony, Your Honor, giving the Commonwealth all its inferences, does not rise to a level -- does not rise to a level to meet the standard that the Commonwealth must meet at this stage.

Mr. Cejas, from a credibility standpoint, should leave the court with a lot to be desired; and taking all the inferences form his testimony, there is insufficient evidence to reach a prima facie standard.

Moving on to the documents -- there's nothing to corroborate any of the testimony of Mr. Cejas as it relates to Mr. Meyers. That's the key.

Now, they can corroborate in minute detail the activities which involve the marijuana arriving and being unloaded, but as far as the defendant's involvement, they have no corroboration.

What the Commonwealth will argue to the court is that his address book is corroboration. It certainly is not corroboration of any agreement. The fact that a defendant's name appears in a phone book doesn't corroborate that he had discussions with the defendant involving conspiracy to distribute.

Now, you can make that assumption that because he had his phone book, phone number in his notebook, that that supports Cejas' testimony that he had met with Mr. Meyers on three occasions. I mean the meeting themselves don't add up to a hill of beans; and I know the Commonwealth is going to suggest that -- even at the Fort Lauderdale meeting, the only records, Judge, in these three meetings -- getting back to these three meetings about contraband -- he said he might have referred at Fort Lauderdale at that restaurant -- they might have referred to it or he might have referred to it by weed.

What you have in this case is a lot of might haves -- could haves and might haves. You have a case that's ten years old, and you have three alleged meetings with no specificity. Then you have his notebook with many numbers and many names, Your Honor.

He doesn't have the name Dick Meyers in that phone book. He has the -- a phone number with seven digits that the Commonwealth will argue if you add the area code, it's Marathon; and if you add the area code, it's the dock, right?

Then you have a man -- phone records from the Island Motel -- the Ocean Island Motel, the motel, hotel in question. It's very convenient and very puzzling if the Commonwealth wants to argue that these phone calls from Room 116 to Marathon involve marijuana discussions. First of all, he has no party to that conversation. He cannot produce and has not produced any witness who made that phone call or received any phone calls.

The Commonwealth is asking you, Your Honor, to assume that three phone calls dated 11-18, 11-19 from Room 116 to Marathon -- they are going to ask you to assume it was this defendant who took the call? He's going to ask you to assume that the person who made the call -- it wasn't Cejas.

Well, could have been this mysterious girlfriend. It could have been Lester, and we're getting back to could haves. It could have been one of them, could have been the defendant, could have been marijuana discussions.

I mean, that's why police officers -- Judge, if they want to know what conversation was spoken on a telephone, which they can't do in all investigations, then they intercept the conversations and they record them. I mean, otherwise, using the Commonwealth's logic, why have wire intercept because under their theory, as long as you have two phone numbers between two individuals and one of them is involved in drug activities or criminal activities, that's enough, which you should make the assumption that it was criminal activities being discussed. So that's a fallacy of the Commonwealth trying to bootstrap Cejas with phone numbers or phone calls made from Ocean Island to Marathon.

Cejas told His Honor and the jury that he, in some sort of convoluted way that night when the trouble with the MARY JANE in terms of unloading it, he somehow gets the number from Lester -- Lester is there, somewhere. He's sort of -- you know -- he drops in from heaven now and then -- or comes up from hell; and when it's convenient for Cejas to say, oh, I got the number-- I probably got the number--is. what he said -- from Lester, and Lester probably called Meyers to get permission to give me Meyers' number in Marathon; but, Your Honor, there's no record of that phone call. There's no record of that phone call that he said -- Cejas says he made to the defendant during the unloading activities. No documentation to support Cejas' contention that he called Dick Meyers.

So phone numbers, names and addresses -- if you look at that address book, if my name was in it, and there were phone calls running to and from my office, my home, just

substitute me for the defendant. Anyone could be substituted for him if he was on the phone.

It's only his phone number, and the Commonwealth wants to impute culpability because there was phone calls made from Room 116 to Marathon. They want to impute culpability -- criminal culpability because somebody called Marathon; and they want to impute not only criminal culpability of a general nature, they want to say it relates to him.

It's like his exclusive phone number and no one else answers the phone and no one else has any conversations on the phone, and the only conversations he has are marijuana conversations, and its all just -- its like a house of cards.

It has no -- this case has no foundation because the government's foundation is Willie Cejas, and he could do a tap dance around this courtroom on a moment's notice to avoid being prosecuted. He does not want to come back here.

I know it's not personal with His Honor. He does not want to come back here and face His Honor when it came to sentencing on a crime that carries five to thirty or five to forty, whatever; and he's the leader. I mean, he's the money man, the leader carries the money. He's the leader of this Cape Charles operation but he's passing it off to Lester that he's the point guy. He's the team captain.

So when you consider all these circumstances -- the notebook, the phone calls -- they don't corroborate the key question. The key question is has the Commonwealth made a prima facie case that Dick Meyers, the defendant, agreed to possess marijuana with intent to distribute; and it's Willie Cejas. They are going to window dress Willie Cejas, put the curtains, the Venetian blinds with all these documents; but

these documents don't support the meeting at Wright's Restaurant, meeting at Pier 66, or meeting down at the dock on a third occasion.

So for all those reasons, Your Honor, we would tell the court this ten-year-old case should be dismissed or should be stricken by the court and not allowed to go to the jury for all reasons I have stated.

MR. JONES: May it please the court.

Mr. Morchower just made an argument that would be more appropriate to the jury than the court. I agree with what he says that the Commonwealth's case is very, very much dependent on what Wilfredo Cejas said; and, of course, he has given Your Honor some reasons to question his credibility, including his record and so on.

I suppose he would do a tap dance for the Commonwealth; but in fact, it's the job of the jury to judge the credibility of this man; and, of course, they have gotten to see him twice; and they can arrive at an opinion.

I will say that his evidence is corroborated by his phone book and by the phone calls and so on, so forth. The telephone logs are not brought to the jury yet, but it's before the court, also reflect the telephone call from Mr. Meyers' house in Marathon to the motel at the appropriate time, and a collect call from Virginia Beach at the approximate time to Cejas.

I don't know, of course, what a jury will do with this case; but the standard is could a reasonable person reasonably conclude that this man was guilty. The cases are replete with references to the problems of proving cases of this sort. It is routine. The Supreme Court acknowledges that the

Commonwealth has to rely on evidence of this sort, not only from criminals, but also circumstantial evidence; and we have put that evidence before Your Honor, we put that evidence before the jury, and we are very eager, very eager to hear what the jury has to think about it.

THE COURT: Well, I agree, gentlemen, that this case depends on whether or not the jury is going to believe Mr. Cejas. I'll overrule the motion and let it go to the jury.

All right.